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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 DAI NGUYEN,

12 Plaintiff,

13 v.

14 JOHN STOLLER, et al.,

15 Defendants.
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No. 2:23-CV-1157-WBS-DMC-P

ORDER

17 Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to
18 42 U.S.C. § 1983. Pending before the Court is Plaintiff's original complaint, ECF No. 1.

19 The Court is required to screen complaints brought by prisoners seeking relief
20 against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C.
21 § 1915A(a). This provision also applies if the plaintiff was incarcerated at the time the action was
22 initiated even if the litigant was subsequently released from custody. See Olivas v. Nevada ex rel.
23 Dep't of Corr., 856 F.3d 1281, 1282 (9th Cir. 2017). The Court must dismiss a complaint or
24 portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can
25 be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See
26 28 U.S.C. § 1915A(b)(1), (2). Moreover, the Federal Rules of Civil Procedure require that
27 complaints contain a “. . . short and plain statement of the claim showing that the pleader is
28 entitled to relief.” Fed. R. Civ. P. 8(a)(2). This means that claims must be stated simply,

1 concisely, and directly. See McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996) (referring to
 2 Fed. R. Civ. P. 8(e)(1)). These rules are satisfied if the complaint gives the defendant fair notice
 3 of the plaintiff's claim and the grounds upon which it rests. See Kimes v. Stone, 84 F.3d 1121,
 4 1129 (9th Cir. 1996). Because Plaintiff must allege with at least some degree of particularity
 5 overt acts by specific defendants which support the claims, vague and conclusory allegations fail
 6 to satisfy this standard. Additionally, it is impossible for the Court to conduct the screening
 7 required by law when the allegations are vague and conclusory.

8 9 **I. PLAINTIFF'S ALLEGATIONS**

10 Plaintiff Dai Nguyen names the following as defendants: (1) John W. Stroller,
 11 Public Defender at Sacramento Public Defender Office, (2) Erin J. Radekin, Court Appointed
 12 Appellate Lawyer at California Appellate Program, (3), Gina Le, Public Defender at Sacramento
 13 Public Defender Office, (4) California Bar Association. See ECF No. 1, pg. 1. Plaintiff asserts
 14 violations of her Sixth and Fourteenth Amendment rights.

15 In his first claim, Plaintiff asserts that his Sixth Amendment right to counsel and
 16 adequate representation has been violated. See id. at 3. Plaintiff argues that he filed a petition for
 17 resentencing to Sacramento Superior Court in October 2019. See id. at 3. Plaintiff was appointed
 18 counselors Leonard Tauman and John Stoller. Plaintiff received a letter from Public Defenders
 19 "asking for issues to be raised." Id. Plaintiff responded to the Public Defender, presenting all the
 20 issues Plaintiff believed would make him eligible for resentencing. See id. Plaintiff specifically
 21 provided an error in jury instruction on "CALJIC 8.31." Id. Plaintiff asserts that Defendants
 22 Tauman and Stoller claimed they had researched the issue and did not believe Plaintiff was
 23 eligible and requested to dismiss the petition. See id. Plaintiff refused dismissal and requested to
 24 be present at the order to show cause hearing. See id. Plaintiff was transported to court on March
 25 24, 2020, but could not attend due to a possible COVID-19 infection at North Kern State Prison.
 26 See id. All transfers were subsequently cancelled, followed by a COVID-19 shutdown on April
 27 10, 2020. See id.

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1 According to Plaintiff, Defendant Tauman was unassigned as counsel, and
2 Defendant Stoller remained. See id. at 4. Plaintiff asserts that on June 4, 2020, a conference took
3 place in which Plaintiff was to be physically present, but Stoller waived Plaintiff's rights without
4 Plaintiff's permission. See id. A new court date was then scheduled for August 21, 2020. See id.
5 Plaintiff asserts that Stoller guaranteed Plaintiff by letter that Plaintiff would be present at the
6 August 21, 2020, hearing. See id.

7 Plaintiff further states that he received word from Stoller informing Plaintiff that
8 Plaintiff would not be present at the hearing, which "will be in oral arguments." Id. Apparently,
9 the hearing was held by videoconference instead. Plaintiff asserts that, at the hearing, Stoller
10 attempted to coerce Plaintiff into incriminating himself on video. See id. Plaintiff contends that he
11 refused to speak about the case and instructed Stoller to raise the issues previously discussed to
12 qualify for resentencing. See id. at 5. Plaintiff claims that Stoller refused and told Plaintiff "you
13 can tell the judge that yourself." Id. Plaintiff asserted that the petition was denied on September
14 8, 2020. See id. Plaintiff then filed an objection, and claims that the judge did not consider it. See
15 id.

16 Plaintiff filed a motion for ineffective assistance of counsel to the judge citing
17 jurisdiction because Stoller had filed a notice of appeal, and the motion was denied. See id.
18 Plaintiff further filed a state bar complaint to the State Bar Association. See id. The complaint
19 was denied, and Plaintiff appealed to the State Bar Association in San Francisco, and that appeal
20 was also denied. See id. Plaintiff filed a petition for review to California Supreme Court, which
21 was denied on January 5, 2022. See id.

22 According to Plaintiff, on appeal to the Court of Appeal involving Plaintiff's
23 resentencing petition, Plaintiff was appointed counsel, Defendant Erin J. Radekin. See id. at 6.
24 Plaintiff immediately informed Radekin that, if she did not want to raise CALJIC 8.31, Plaintiff
25 would request a new attorney. See id.

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1 Plaintiff contends that the only communication made with Radekin was through an
2 extension of time filed with the court. See id. Plaintiff claims that after one year of
3 representation, Radekin made an attorney phone call through the prison to notify Plaintiff that
4 Radekin wanted to dismiss the appeal. See id. Radekin expressed to Plaintiff that she did not want
5 to raise the issue due to her ethics as a lawyer. See id. Radekin did not believe CALJIC 8.31 was
6 the basis of a viable claim and notified Plaintiff that she was waiting on case law from other
7 cases. See id.

8 According to Plaintiff, after completing some independent research, Plaintiff found
9 that the case law Radekin was waiting on was the same case Defendant Stoller used at the order
10 show cause hearing. See id. However, Plaintiff argues that the case being utilized, People v. Soto,
11 had no equivalent issues to Plaintiff's case. See id. Plaintiff asserts that Stoller and Radekin used
12 bad case law and assumed the role of surrogate prosecutor. See id.

13 Plaintiff contends that he filed a motion to substitute counsel to the Court of
14 Appeal and was denied without inquiry. See id. Plaintiff additionally filed a writ of mandate to
15 the California Supreme Court and was denied on January 3, 2022. See id. Plaintiff asserts that he
16 then filed a complaint against Radekin with the State Bar. See id. at 6-7. Plaintiff claims that
17 immediately after this complaint was filed, Radekin filed a brief raising no issues, which allowed
18 Plaintiff to raise issues to the Court of Appeal on his own. See id. at 7. The Court of Appeal
19 denied the brief and Plaintiff asserts Radekin refused to file a request for rehearing or petition for
20 review to California Supreme Court. See id. Plaintiff contends that Radekin was engaging as a
21 surrogate prosecutor and denied Plaintiff's right to adequate counsel. See id.

22 Plaintiff asserts that he immediately filed a new petition, under new law,
23 petitioning for resentencing. See id. at 7. Plaintiff was appointed counsel and, despite written
24 objection to the public defender's office, Plaintiff was assigned Stoller again. See id. The district
25 attorney filed a responsive pleading and Plaintiff claims he did not receive a copy of said
26 pleading. See id. New counsel, Defendant Gina Le, was then appointed. See id. Plaintiff asserts
27 that an order to show cause was scheduled for February 24, 2023. See id. Plaintiff was unable to
28 attend the hearing and the hearing was rescheduled for April 14, 2023. See id. Plaintiff asserts

1 that Le notified Plaintiff through a prison phone call that she would be on leave, and Stoller
2 would represent Plaintiff at the hearing. See id. Plaintiff claims he objected and believes Le was
3 inadequate by allowing Stoller to represent him. See id.

4 According to Plaintiff, at the hearing on April 14, 2023, Plaintiff was physically
5 present. See id. at 8. Plaintiff contends that he requested a Marsden motion for new counsel. See
6 id. Plaintiff notified the judge that Stoller would not raise the issues and Plaintiff would therefore
7 need to enter the documents before the hearing to be considered at the hearing. See id. The judge
8 denied the Marsden motion and immediately denied the petition as successive. See id. Plaintiff
9 contends that Stoller did not raise any objection and allowed the judge to deny the petition. See
10 id.

11 Plaintiff asserts that Stoller was again ineffective as he failed to notify Plaintiff
12 that the District Attorney was arguing the petition as successive. See id. Plaintiff claims that if he
13 had known, he could have argued that petitions and record conviction cannot be used at order to
14 show cause hearings. People v. Newsome, E077906, Rule 8,15(b). See id. at 8-9. According to
15 Plaintiff, Stoller was aware of this provision but did not want to raise it because it was only for
16 “highly probable” cases. Id. at 9. Plaintiff asserts that failing to raise this issue at the hearing
17 denied Plaintiff the right to adequate counsel or the right to counsel in general. See id. Plaintiff
18 later filed a motion for reconsideration and ineffective assistance of counsel. See id. The judge
19 denied it on June 8, 2023. See id.

20 Plaintiff asserts that the denial of adequate counsel from Defendants Stoller, Le,
21 and Radekin created emotional distress. See id. Additionally, Plaintiff claims that the California
22 State Bar caused injury by allowing Stoller to represent Plaintiff, and he was denied the right to
23 adequate counsel. See id.

24 In his second claim, Plaintiff asserts Defendant Stoller and Le violated his Sixth
25 Amendment right to a fair hearing. See id. at 10. Plaintiff claims that denying his right to
26 adequate counsel at the August 21, 2020, and April 14, 2023, hearing denied Plaintiff a right to a
27 fair hearing. See id. According to Plaintiff, if all issues were raised at both hearings, those
28 hearings would have been considered fair, and all rights preserved. See id. Plaintiff further asserts

1 that Defendant Gina Le acted as a surrogate prosecutor and allowed the prosecution and judge to
2 deny the petition. See id. Plaintiff states that he was denied the right to a fair hearing by
3 Defendants Stoller and Le, and in turn, experienced emotional distress. See id.

4 In his third claim, Plaintiff argues that Defendant Radekin violated his Fourteenth
5 Amendment right to appeal. See id. at 11. Plaintiff claims that if Radekin had clearly conveyed
6 that she would not represent Plaintiff, Plaintiff would have been appointed another lawyer to
7 represent him. See id. Plaintiff asserts that Radekin did not raise any issues or research any claims
8 made by Plaintiff. See id. Plaintiff claims that by not filing the proper brief on the issues and
9 refusing to file a request for rehearing and petition for review to the California Supreme Court,
10 Radekin denied Plaintiff the right to appeal. See id. Plaintiff asserts that due to the denial of the
11 right to appeal Plaintiff experienced emotional distress. See id.

12 13 II. DISCUSSION

14 When a state prisoner challenges the legality of his custody and the relief, he seeks
15 is a determination that he is entitled to an earlier or immediate release, such a challenge is not
16 cognizable under 42 U.S.C. § 1983. The prisoner's sole federal remedy is a petition for a writ of
17 habeas corpus. See Preiser v. Rodriguez, 411 U.S. 475, 500 (1973); see also Neal v. Shimoda,
18 131 F.3d 818, 824 (9th Cir. 1997); Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9th Cir.
19 1995) (per curiam). Thus, where a § 1983 action seeking monetary damages or declaratory relief
20 alleges constitutional violations which would necessarily imply the invalidity of the prisoner's
21 underlying conviction or sentence, or the result of a prison disciplinary hearing resulting in
22 imposition of a sanction affecting the overall length of confinement, such a claim is not
23 cognizable under § 1983 unless the conviction or sentence has first been invalidated on appeal, by
24 habeas petition, or through some similar proceeding. See Heck v. Humphrey, 512 U.S. 477, 483-
25 84 (1994) (concluding that § 1983 claim not cognizable because allegations were akin to
26 malicious prosecution action which includes as an element a finding that the criminal proceeding
27 was concluded in plaintiff's favor).

28 Here, Plaintiff asserts that Defendants failed to adequately represent Plaintiff,

1 ultimately resulting in a violation of Plaintiff's Sixth Amendment right to a fair hearing and right
2 to counsel. Plaintiff additionally contends that Defendant Radekin violated Plaintiff's Fourteenth
3 Amendment right to appeal because she failed to clearly convey that she refused to represent
4 Plaintiff.

5 Plaintiff asserts Defendants Stoller and Le violated his right to counsel and
6 adequate representation. Plaintiff contended that he filed a motion for resentencing and
7 Defendants refused to argue the issues Plaintiff believed would make him eligible for
8 resentencing, specifically an error in jury instruction under CALJIC 8.31. Plaintiff stated
9 throughout the complaint the multiple times he requested Defendants use CALJIC 8.31, in
10 response to which Defendants stated either that they were awaiting new case law or outright
11 refused to argue the issue. According to Plaintiff, if all issues were raised at both hearings, those
12 hearings would have been considered fair, and all rights preserved.

13 Plaintiff argues Plaintiff's violated his constitutional right to effective assistance of
14 counsel and his right to counsel because Defendants refused to present issues Plaintiff believed
15 would qualify Plaintiff for resentencing. Under Heck, actions that would essentially imply the
16 invalidity of the prisoner's underlying conviction or sentence cannot be brought under 1983 the
17 sentence has first been invalidated on appeal by a habeas petition or through some similar
18 proceeding. A claim is not cognizable under § 1983 where a § 1983 action seeking monetary
19 damages alleges a constitutional violation that would essentially imply the invalidity of the
20 prisoner's underlying conviction or sentence unless the conviction or sentence has first been
21 invalidated on appeal, by a habeas petition, or through some similar proceeding.

22 Because Plaintiff is presenting a constitutional violation regarding his eligibility
23 for resentencing and Plaintiff's conviction or sentencing have not been invalidated or otherwise
24 set aside, Plaintiff's claims are not cognizable under § 1983. Considering Plaintiff's pro se status,
25 the Court will allow an opportunity to amend and assert any facts, if available, that show the
26 claim goes beyond challenging the validity of Plaintiff's conviction or sentencing, or that the
27 conviction and sentence have been set aside or otherwise invalidated.

III. CONCLUSION

Because it is possible that the deficiencies identified in this order may be cured by amending the complaint, Plaintiff is entitled to leave to amend prior to dismissal of the entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc). Plaintiff is informed that, as a general rule, an amended complaint supersedes the original complaint. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). All claims alleged in the original complaint which are not alleged in the amended complaint are waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987). The Court cannot refer to the prior pleading in order to make Plaintiff's amended complaint complete. See Local Rule 220. An amended complaint must be complete in itself without reference to any prior pleading. See id.

If Plaintiff chooses to amend the complaint, Plaintiff must demonstrate how the conditions complained of have resulted in a deprivation of Plaintiff's constitutional rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). The complaint must allege how each named defendant is involved and must set forth some affirmative link or connection between each defendant's actions and the claimed deprivation. See May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

Finally, Plaintiff is warned that failure to file an amended complaint within the time provided in this order may be grounds for dismissal of this action. See Ferdik, 963 F.2d at 1260-61; see also Local Rule 110. Plaintiff is also warned that a complaint which fails to comply with Rule 8 may, in the Court's discretion, be dismissed with prejudice pursuant to Rule 41(b). See Nevijel v. North Coast Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981).

Accordingly, IT IS HEREBY ORDERED as follows:

1. Plaintiff's original complaint is dismissed with leave to amend; and
2. Plaintiff shall file a first amended complaint within 30 days of the date of service of this order.

Dated: March 12, 2024



DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE